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JOSEPH F. SPANIOL, JR.
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No. 87-1736

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

MOLINS PLC,

Petitioner,

v.

DONALD J. QUIGG,

Assistant Secretary of Commerce,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)..... 1

Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970)..... 2, 3

Respondent's memorandum accentuates the urgent need to have this Court examine the Federal Circuit's "choice-of-federal law" rule before it is applied in other federal law cases to reach results anomalous to the concept of a "federal" judiciary. In this case, that rule has led to the refusal of the lower courts to consider a ripe challenge to an administrative policy which had been finally applied and never withdrawn, a policy which respondent's brief acknowledges is vague and impliedly concedes was never promulgated in accordance with rule-making provisions of the Administrative Procedure Act. That rule has also led to a basic misinterpretation of Abbott Laboratories and the creation of "super standing" beyond anything envisioned by the framers of the

Constitution in requiring a "case or controversy" to invoke federal jurisdiction.

Petitioner has challenged the application of the Federal Circuit's choice-of-law policy in federal question cases. Respondent contends this Court need not consider this claim since "[p]etitioner did not raise this issue before the court of appeals" (Respondent's Memorandum 4). Respondent cites Adickes v. S.H. Kress and Co.[1] in support of this contention.

Of course, petitioner could not challenge the application of the Federal Circuit's choice-of-law policy until that policy had been applied against petitioner by the court of appeals. The footnote in Adickes v. S.H. Kress and Co. to which respondent refers concerns a challenge to a

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[1] 398 U.S. 144, 147, n. 2 (1970).

district court ruling which could have been but was neither raised before nor considered by the court of appeals. Adickes is inapposite to the present case.

Respondent contends it is inappropriate to review the Federal Circuit's choice-of-law rule since "petitioner does not suggest that any other court of appeals' ripeness decisions would have produced a different result" (Respondent's Memorandum 4, n. 4).

Petitioner does not seek to have "any other court of appeals' ripeness decisions" applied. It is petitioner's position that the Federal Circuit should have enunciated its own ripeness jurisprudence based upon constitutional and prudential principles rather than misinterpreting and misapplying D.C. Circuit ripeness law.

The memorandum of respondent is totally silent as to the challenge of petitioner to the FAFR policy as being violative of the Administrative Procedure Act rule-making provision. Respondent has never challenged the statement that petitioner and others who regularly file patent applications are faced with a policy which the respondent impliedly concedes is ambiguous or, in his words, has "undefined terms within the policy itself." This constitutes a concrete disagreement over a policy with concrete and continuing effects.

Respondent incorrectly characterizes the FAFR policy as a "regulation". It is not. However, respondent seeks the benefit of presumptions normally accorded to regulations which have endured the rigors of

the Administrative Procedure Act in connection with the PTO's unpublished policy.

The Federal Circuit's decision leaves in place for application against petitioner and others an agency policy which was applied against petitioner in a concrete setting, which contains undefined terms within the policy itself and which has not been published in accordance with the rule-making provisions of the Administrative Procedure Act.

It is therefor submitted that the petition for writ of certiorari should be granted.

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